

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF TEXAS
3 MARSHALL DIVISION
4 UNITED STATES OF AMERICA,) (
5 ET AL., EX REL., CALEB) (
6 HERNANDEZ & JASON WHALEY,) (
7 RELATORS) (CIVIL ACTION NO.
8) (2:16-CV-432-JRG
9 VS.) (MARSHALL, TEXAS
10) (
11 TEAM HEALTH HOLDINGS, INC.,) (DECEMBER 9, 2020
12 ET AL.) (9:03 A.M.

13 MOTION HEARING
14 BEFORE THE HONORABLE JUDGE RODNEY GILSTRAP
15 UNITED STATES CHIEF DISTRICT JUDGE

16
17 FOR THE PLAINTIFFS: (See Attorney Attendance Sheet docketed
18 in minutes of this hearing.)

19 FOR THE DEFENDANTS: (See Attorney Attendance Sheet docketed
20 in minutes of this hearing.)

21 COURT REPORTER: Shelly Holmes, CSR, TCRR
22 Official Reporter
23 United States District Court
24 Eastern District of Texas
 Marshall Division
 100 E. Houston Street
 Marshall, Texas 75670
 (903) 923-7464

25 (Proceedings recorded by mechanical stenography, transcript
produced on a CAT system.)

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I N D E X

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09:03:23 1 COURT SECURITY OFFICER: All rise.

09:03:25 2 THE COURT: Be seated, please.

09:03:26 3 All right. This is the time set for motions

09:04:16 4 pending before the Court in United States versus Team

09:04:27 5 Health. This is Civil Action 2:16-CV-432.

09:04:31 6 This is an action brought by -- by relators on

09:04:37 7 behalf of it in the stead of the United States under the

09:04:40 8 False Claim Act.

09:04:41 9 Let me ask for announcements at this time.

09:04:44 10 Who's here on behalf of the relators?

09:04:46 11 MR. DUCK: Good morning, Your Honor. Trey Duck,

09:04:49 12 Cody Hill, and Nick Shodrok on behalf of the relators.

09:04:52 13 We're ready to proceed. Thank you.

09:04:53 14 THE COURT: All right. What's the announcement

09:04:55 15 from the Defendants?

09:04:55 16 MR. FINDLAY: Good morning, Your Honor. Eric

09:04:56 17 Findlay on behalf of Defendants. At table with me is

09:04:59 18 Mr. Tom Melsheimer, Ms. Robine Grant. And then also here

09:05:02 19 with me, Mr. Wesley Hill, Ms. Paula Hinton, Ms. Renee

09:05:06 20 Wilkerson, and Mr. Grant Schmidt. And we're all ready to

09:05:10 21 proceed.

09:05:11 22 THE COURT: All right. Thank you.

09:05:11 23 MR. MELSHEIMER: Good morning, Your Honor.

09:05:12 24 THE COURT: Good morning.

09:05:13 25 Counsel, before we turn to the remainder of the

09:05:20 1 motions, I'd first like to clarify on the record the
09:05:26 2 parties stat -- status with regard to Document No. 312,
09:05:30 3 which is relators' motion to voluntarily dismiss the
09:05:35 4 Plaintiff states as parties.

09:05:39 5 That motion was apparently opposed at the time of
09:05:44 6 filing, but my understanding is that opposition has
09:05:51 7 subsided, and the motion is effectively unopposed, the
09:05:55 8 motion being to dismiss the party states on the Plaintiffs'
09:06:04 9 side or the relators' side of the case, being Texas,
09:06:10 10 Tennessee, Florida, Louisiana, Connecticut, Massachusetts,
09:06:14 11 Georgia, and Indiana, unless I've missed somebody.

09:06:17 12 And my understanding is this dismissal would be as
09:06:20 13 to the entirety of these states' claims, all of which are
09:06:23 14 based upon Medicaid issues.

09:06:25 15 Let me ask for clarification from both sides as to
09:06:28 16 where we stand on that, and if, in fact, this is now an
09:06:33 17 unopposed motion.

09:06:34 18 What's the relators' posture?

09:06:37 19 MR. DUCK: Yes, Your Honor. Would you like me to
09:06:38 20 present from the podium?

09:06:40 21 THE COURT: Yes, I would.

09:06:46 22 MR. DUCK: Thank you, Your Honor. May it please
09:06:47 23 the Court.

09:06:48 24 I think this is relatively straightforward. Your
09:06:52 25 Honor described a situation, as we see it, exactly as it

09:06:56 1 is.

09:06:56 2 There was one clarification that was needed
09:06:58 3 amongst the parties, which was that the relators are not
09:07:02 4 intending to re-file on behalf of the Plaintiff states in
09:07:06 5 the future following dismissal.

09:07:08 6 Once we gave that assurance to Defendants, it's my
09:07:12 7 understanding that resolved any problems they had in
09:07:16 8 opposing the motion.

09:07:18 9 So long as the Plaintiff states themselves are
09:07:21 10 dismissed without prejudice and the relators have agreed
09:07:25 11 they will not re-file those claims on behalf of the
09:07:28 12 Plaintiff states, we're in agreement. And we have a
09:07:31 13 proposed order that we can present to Your Honor.

09:07:35 14 THE COURT: So, in effect, Mr. Duck, are you
09:07:37 15 telling me that this dismissal as to these relators would
09:07:40 16 be with prejudice but would not prejudice any potential
09:07:43 17 claims either by the states themselves or other relators
09:07:47 18 who are not active in this case?

09:07:49 19 MR. DUCK: Yes, Your Honor. That's exactly right.

09:07:51 20 THE COURT: All right. Can Defendants confirm
09:07:53 21 that that's an accurate rendition of where we stand?

09:07:57 22 MR. SCHMIDT: Your Honor, may I approach the
09:07:59 23 podium?

09:07:59 24 THE COURT: Please.

09:08:00 25 MR. SCHMIDT: May it please the Court. Your

09:08:01 1 Honor, the way that you just described is exactly our
09:08:01 2 position that the claims the relators themselves brought
09:08:04 3 would be dismissed with prejudice, but the claims on behalf
09:08:07 4 of the Plaintiff states brought by the Plaintiff states
09:08:09 5 would be dismissed without prejudice.

09:08:11 6 THE COURT: All right. And have both sides
09:08:13 7 reviewed the proposed order to perfect --

09:08:13 8 MR. SCHMIDT: Yes, Your Honor.

09:08:16 9 THE COURT: -- this dismissal?

09:08:17 10 MR. SCHMIDT: And we have a copy -- I think I have
09:08:20 11 a copy of it for the Court if -- if you'd like to review
09:08:21 12 it.

09:08:22 13 THE COURT: Well, let me just say this. Based on
09:08:23 14 what you've told me on the record and subject to review of
09:08:26 15 the motion itself, I'll grant the unopposed motion by
09:08:30 16 relators to dismiss these states on the terms announced
09:08:35 17 into the record.

09:08:35 18 There's no need for me to review the document from
09:08:39 19 the bench. If you'll submit it electronically, as long as
09:08:42 20 it comports with what you've told me, I'll get it entered,
09:08:45 21 and we'll have this disposed of.

09:08:47 22 MR. SCHMIDT: Yes, Your Honor, we'll do that
09:08:48 23 today.

09:08:49 24 THE COURT: Thank you.

09:08:49 25 MR. SCHMIDT: Thank you.

09:08:50 1 MR. DUCK: Thank you, Your Honor.

09:08:51 2 THE COURT: Okay. That being done, let's move to
09:08:54 3 the remaining matters we have set today.

09:08:58 4 Let's start with the Defendants' two companion
09:09:05 5 motions for protection regarding confidentiality
09:09:08 6 designations. This is Document 263 and Document 327. And
09:09:12 7 let me hear from the moving Defendants on these two
09:09:14 8 motions.

09:09:23 9 MR. FINDLAY: Thank you, Your Honor. May it
09:09:24 10 please the Court. Eric Findlay on behalf of the
09:09:25 11 Defendants.

09:09:26 12 THE COURT: Please proceed, Mr. Findlay.

09:09:28 13 MR. FINDLAY: Thank you, Your Honor.

09:09:29 14 Your Honor, I think the place to start --

09:09:38 15 THE COURT: And let me stop you before we get to
09:09:41 16 the place to start.

09:09:41 17 MR. FINDLAY: Yes, sir.

09:09:42 18 THE COURT: Given the substance of these motions,
09:09:45 19 does the argument of this morning need to be under seal, or
09:09:49 20 is it appropriate for presentation in an open courtroom and
09:09:52 21 an open transcript?

09:09:53 22 MR. FINDLAY: Thank you for that question. It is
09:09:54 23 perfectly all right to have this discussion in open court,
09:09:59 24 Your Honor. It does not need to be sealed.

09:10:01 25 THE COURT: Okay.

09:10:01 1 MR. FINDLAY: That does get to where I thought it
09:10:04 2 might make sense to start, and it relates to the second
09:10:08 3 bullet point.

09:10:08 4 And, Your Honor, let me hand out some slides real
09:10:12 5 quickly if I might.

09:10:18 6 May I approach?

09:10:19 7 THE COURT: You may.

09:10:21 8 MR. FINDLAY: I think that the crux of the
09:10:28 9 dispute, Your Honor, really is to the second bullet point
09:10:30 10 that you see on the screen is that we believe relators are
09:10:33 11 confusing or conflating the standard with sealing and
09:10:36 12 keeping out of the public record information which contains
09:10:41 13 sensitive material at a hearing or trial as opposed to
09:10:48 14 appropriate designations of confidential material under the
09:10:50 15 protective order.

09:10:50 16 As Your Honor is well aware, this Court has a
09:10:54 17 standing order regarding protection and proprietary or
09:10:58 18 confidential information at hearing or trial, which has a
09:11:01 19 higher standard, appropriately so, for excluding materials
09:11:07 20 from the public record at a hearing such as this or at
09:11:10 21 trial as we'll have in March.

09:11:12 22 That standard is considerably higher than simply
09:11:15 23 what is provided for under the protective order. And I
09:11:17 24 really think that's kind of the nub of the issue here.

09:11:23 25 Plain -- relators, excuse me, are, I think, taking

09:11:26 1 the position that our confidentiality designations are
09:11:29 2 somehow improper because they don't meet that higher
09:11:32 3 standard. And that's just not the point that we're at yet
09:11:36 4 in the case, Your Honor.

09:11:38 5 THE COURT: Is the dispute here whether these
09:11:43 6 materials should be subject to public dissemination or not,
09:11:48 7 or is the issue here whether they should be deemed
09:11:55 8 confidential or alternatively perhaps designated as
09:11:59 9 attorneys' eyes only under the protective order or some
09:12:01 10 other means by which their dissemination should be
09:12:06 11 restricted?

09:12:07 12 Is it whether or not there should be a restriction
09:12:10 13 at all, or is it they should be restricted, but we differ
09:12:13 14 on the means by which the restriction should be applied?

09:12:16 15 MR. FINDLAY: Can you go to the next slide,
09:12:17 16 please, Ms. Grant?

09:12:18 17 My understanding, Your Honor, from the relators'
09:12:21 18 positions, is that all confidentiality designations over
09:12:24 19 these thousands of pages of material are frivolous as
09:12:28 20 they've tried to call it in their papers, which we
09:12:31 21 obviously strongly disagree with.

09:12:33 22 Most, if not all the documents, are marked
09:12:35 23 confidential, and you see the definition at the top of the
09:12:37 24 screen on Slide 4. Confidential proprietary and business
09:12:41 25 information that bears significantly on the parties'

09:12:42 1 claims, et cetera. That's what most of this material is,
09:12:46 2 confidential.

09:12:46 3 They are taking the position, I think
09:12:49 4 inappropriately, whether intentionally or not, that since
09:12:52 5 we haven't come forward with the sort of burden that we
09:12:55 6 would have to, Your Honor, at trial, if we were trying to
09:12:58 7 seal the courtroom because we wanted Exhibit A to be
09:13:01 8 presented but we didn't want the public to see it, they're
09:13:04 9 taking the position, I believe, that since we haven't come
09:13:07 10 forward with that sort of proof now, that they should all
09:13:11 11 be de-designated completely, and they're fair game to be
09:13:14 12 used in the public however the relators see fit, and as
09:13:20 13 we'll discuss a little bit later, we think for really
09:13:23 14 improper purposes.

09:13:23 15 But if you could go back one slide, please,
09:13:26 16 Ms. Grant. Thank you.

09:13:27 17 The language from your standing order does have a
09:13:30 18 higher burden. There's no question. It indicates that the
09:13:34 19 information sought to be protected is of such a sensitive
09:13:37 20 nature that a disclosure creates a risk of harm that
09:13:41 21 outweighs the strong presumption in favor of public access.

09:13:45 22 That's the determination that will happen either
09:13:47 23 much closer to or at trial, Your Honor, in our
09:13:50 24 experience -- folks on our side, at least.

09:13:53 25 And from a very practical standpoint, as I

09:13:56 1 mentioned, the relators are challenging the confidentiality
09:13:59 2 of dozens of different PDFs which amount to thousands of
09:14:05 3 pages of material, both in terms of deposition exhibits,
09:14:08 4 emails, policies, procedures, et cetera.

09:14:11 5 We know from a very practical standpoint, Your
09:14:14 6 Honor, that a small fraction of those materials will
09:14:18 7 actually be used at trial, maybe a couple dozen.

09:14:22 8 Your Honor puts time limits on the parties. There
09:14:25 9 has to be a real culling and a determination of what
09:14:27 10 exactly is important enough to be presented to the jury.

09:14:30 11 Out of that much, much smaller universe, it is
09:14:32 12 conceivable that we may have several documents that we
09:14:35 13 think rise to this level, and we will urge the Court to
09:14:39 14 seal the proceedings when those documents are discussed in
09:14:43 15 front of the jury.

09:14:44 16 At that time, relators surely have the right to
09:14:47 17 object and can argue that they don't think we've met that
09:14:50 18 burden, but that's a dispute for a later day, Your Honor,
09:14:53 19 we believe.

09:14:53 20 THE COURT: Tell me this, Mr. Findlay. Why didn't
09:14:57 21 Defendants -- and maybe I'm confused here, but why didn't
09:15:00 22 Defendants simply and more typically designate these as
09:15:04 23 attorneys' eyes only under the protective order, and then
09:15:07 24 we'll worry about what needs to be presented under seal or
09:15:10 25 not presented under seal when we get to trial?

09:15:12 1 MR. FINDLAY: I'm not sure I -- forgive me, I'm
09:15:16 2 not sure I understand the -- the import of the distinction.
09:15:18 3 If you go to the next slide, Ms. Grant.
09:15:20 4 Again, the protective order had three categories
09:15:23 5 of type of protective documents, if you will.
09:15:28 6 Confidential, as we see at the top; highly confidential,
09:15:31 7 which had that additional, you know, risk of substantial
09:15:34 8 harm if it were disclosed; and then a health confidential
09:15:37 9 provision, which isn't on the screen here, which dealt with
09:15:40 10 protected health information.
09:15:42 11 I believe the vast majority of these documents
09:15:44 12 were just marked at the confidential level. The -- the
09:15:49 13 lower level of confidence, which is a lower burden, doesn't
09:15:55 14 have that increased burden of substantial harm but doesn't
09:15:56 15 take away from the fact that these are all internal
09:15:59 16 sensitive materials, and subject, we think appropriately,
09:16:04 17 to not be out in the public realm.
09:16:06 18 If you can go to the next slide, please,
09:16:09 19 Ms. Grant.
09:16:10 20 And in that context, Your Honor, I think it's
09:16:13 21 important to remember what this case is about. This is a
09:16:16 22 False Claims Act case alleging improper billing to
09:16:20 23 Medicare.
09:16:20 24 Inherently we're dealing with patient medical
09:16:20 25 records and charts. We're dealing with medical and patient

09:16:28 1 billing information and policies, Team Health's internal
09:16:30 2 policies and mechanisms for how they handle billing, how
09:16:33 3 they handle patient information, and then, of course, the
09:16:36 4 internal communications from emails within the company and
09:16:39 5 deposition testimony about the same.

09:16:40 6 So really with respect, we don't think it should
09:16:44 7 come to a surprise to the relators that much of this
09:16:47 8 material has been marked confidential, Your Honor.

09:16:51 9 I don't know if that answers Your Honor's initial
09:16:55 10 question about the attorneys' eyes only.

09:16:57 11 But let me -- can you go to Slide 7, please,
09:17:08 12 Ms. Grant?

09:17:08 13 One of the places where relators try to push back,
09:17:12 14 Your Honor, is they somehow suggest, if I'm interpreting
09:17:15 15 their arguments correctly, that because a lot of the --
09:17:17 16 what they call challenged documents have become part of the
09:17:21 17 Court's record in this case, because they've been attached
09:17:24 18 to various motions, they've been used in depositions, that
09:17:27 19 that somehow, I guess, waives the confidentiality in their
09:17:30 20 mind. I don't think there's any merit to that argument
09:17:32 21 whatsoever.

09:17:33 22 None of these are public documents. They were all
09:17:35 23 filed under seal under your Court's orders and procedures.

09:17:40 24 We've filed motions for leave to seal in this
09:17:42 25 case, both sides have, numerous filings. We've then filed

09:17:47 1 the appropriate redacted copies under the Court's rules.
09:17:50 2 To my knowledge, relators have made no objection to those
09:17:54 3 redacted versions at all.

09:17:59 4 THE COURT: Let me -- let me try one more time.

09:18:01 5 Why did not Defendants designate these under the
09:18:05 6 protective order as highly confidential attorneys' eyes
09:18:08 7 only?

09:18:09 8 MR. FINDLAY: I -- my -- because I don't think it
09:18:12 9 was believed that most of them met that standard of
09:18:14 10 confidentiality.

09:18:15 11 They were confidential, yes, but the highly
09:18:18 12 confidential -- I think of it in terms of a patent case
09:18:22 13 perhaps, Your Honor. We usually reserve the highly
09:18:24 14 confidential for just that, the most extreme sensitive
09:18:28 15 materials, source code, perhaps revenue information.

09:18:31 16 I believe most -- most of these were deemed
09:18:34 17 confidential, trying to in good faith categorize them under
09:18:39 18 the Court's protective order and not overdesignate.

09:18:42 19 So many times we see that parties are criticized
09:18:45 20 for overdesignating, automatically going to the highest
09:18:49 21 level.

09:18:49 22 THE COURT: Okay. In other words, you didn't
09:18:51 23 overreach?

09:18:51 24 MR. FINDLAY: We don't believe we did, Your
09:18:53 25 Honor --

09:18:53 1 THE COURT: Okay.

09:18:54 2 MR. FINDLAY: -- no. But we certainly don't think
09:18:56 3 we should be penalized -- and we don't think we should be
09:19:00 4 penalized for not overreaching, if you will, not being held
09:19:03 5 to that higher standard, which as I said, I think is
09:19:06 6 appropriate under the Court's standing order when we get to
09:19:09 7 trial, but not at this point.

09:19:10 8 If you can go to Slide 9, please, Ms. Grant.

09:19:13 9 Thank you.

09:19:13 10 And, Your Honor, we think the relators' motives
09:19:19 11 here are incredibly overbroad, and frankly, inappropriate.
09:19:24 12 You can't see them now, but right behind the bar, I've got
09:19:28 13 10 boxes of material. Those 10 boxes contain notebooks
09:19:31 14 with every page that relators are claiming need to be
09:19:36 15 de-designated.

09:19:37 16 A lot of the caselaw that relators cite -- not all
09:19:39 17 of it but most of it, you were dealing with disputes, one,
09:19:43 18 over whether a protective order should be entered. We
09:19:45 19 don't have that here. Or you were dealing with a dispute
09:19:48 20 where there was a finite or discrete number of documents
09:19:52 21 that were at issue.

09:19:52 22 When we had the meet and confer in this process,
09:19:56 23 initially on the first motion that we filed, I specifically
09:19:58 24 asked the relators: Is there a finite small set of a
09:20:04 25 particular type of document that you're concerned about,

09:20:08 1 because let's talk about that, and maybe we can come to
09:20:12 2 some agreement on.

09:20:12 3 There wasn't. Their claim of wrongful
09:20:15 4 designation, if you will, covers thousands of pages. And
09:20:17 5 we think that's just by its definition far too many and is
09:20:22 6 overreaching.

09:20:23 7 They even want to seek to remove confidentiality
09:20:26 8 from the documents relating to the Medicare -- Medicaid
09:20:30 9 Plaintiffs' case, which as we've just heard, those claims
09:20:34 10 are no longer in the case, Your Honor.

09:20:36 11 And we are concerned with what the relators intend
09:20:44 12 to do with these materials were they to be summarily
09:20:47 13 de-designated by the Court.

09:20:51 14 If you can go to Slide 11, please.

09:20:53 15 There is good lawyer argument in relators' papers,
09:20:58 16 and they're great lawyers, and they write very well.

09:21:01 17 A lot of that language is filled with incendiary
09:21:05 18 language, such that relators are indicating they are
09:21:10 19 playing the judge and the jury, if you will, about whether
09:21:12 20 there's been fraud in this case.

09:21:13 21 These are just a couple of examples from their
09:21:17 22 papers where they claim the public has a right to know
09:21:20 23 Defendants have fraudulently drained millions of taxpayer
09:21:23 24 dollars and company's concealment of fraud or blatant
09:21:28 25 misrepresentation.

09:21:28 1 It goes on and on as though relators apparently
09:21:32 2 are taking the position that the decision has been made as
09:21:35 3 to whether -- who wins this case or not. They think they
09:21:39 4 win the case. They think there's fraud.

09:21:41 5 That gives us serious concern that if these
09:21:44 6 documents were de-designated, Your Honor, if they had no
09:21:46 7 protection on them and they were fair game for anybody to
09:21:49 8 do whatever they wanted with them, they would be used in an
09:21:52 9 inappropriate way. They'd make it to the Internet. They'd
09:21:55 10 make it to a Wikipedia page. They'd be shared with other
09:21:59 11 counsel. But it certainly would be highly prejudicial to
09:22:01 12 my client when these documents are used in that fashion,
09:22:05 13 and we believe grossly taken out of context.

09:22:08 14 Now, relators indicated in one of their filings
09:22:12 15 that they thought this was a sophomoric reaction on our
09:22:17 16 part or that it was hypothetical. It's not, Your Honor.

09:22:20 17 If you go to the next slide, please, Robine.

09:22:23 18 This has already happened once in this case. And
09:22:26 19 I don't know who's responsible for it. I'm not saying the
09:22:29 20 relators were responsible for it. I want that to be
09:22:32 21 abundantly clear.

09:22:33 22 But back in the spring of this year when Your
09:22:36 23 Honor denied Defendants' motion to dismiss relators' First
09:22:40 24 Amended Complaint, a couple weeks later on Team Health's
09:22:43 25 Wikipedia page, there was a long recitation of the Court's

09:22:47 1 denial of that motion.

09:22:50 2 But as you can see in the highlight here, it said:

09:22:53 3 In his opinion, Judge Gilstrap described two schemes to
09:22:56 4 defraud Medicare and several state Medicaid programs that
09:23:01 5 were intended to increase billing for patient care that did
09:23:04 6 not take place.

09:23:05 7 And then it basically verbatim listed the
09:23:08 8 allegations in the First Amended Complaint. To the
09:23:12 9 non-legal-trained eye, the impression was clearly that this
09:23:17 10 Court had made a determination on the merits that these
09:23:21 11 schemes occurred, that they were put in place by Team
09:23:24 12 Health, and that the government was drained fraudulently of
09:23:33 13 millions of dollars.

09:23:33 14 To the non-legal opinion -- to the non-legal eye,
09:23:35 15 that is exactly what that intended. Whoever put that up
09:23:35 16 there, I don't know. You can look at the history, and
09:23:39 17 they're just anonymous names.

09:23:41 18 Interestingly enough, we filed our first motion
09:23:44 19 for protection on October 22nd, I believe. About a week
09:23:47 20 later -- a week later on October 30th, the Wikipedia entry
09:23:53 21 that I just described was wiped clean. It was gone. And
09:23:55 22 as of two days ago, it still isn't back up. It's no longer
09:24:00 23 there, so somebody wiped it.

09:24:02 24 I think that is proof that we have real legitimate
09:24:10 25 substantive, not hypothetical or speculative, concerns that

09:24:15 1 were those boxes of documents behind me somehow completely
09:24:18 2 de-designated with no protection, that they would be used
09:24:21 3 inappropriately and probably in a manner such as this. It
09:24:23 4 certainly is a concern, and I don't think it's an
09:24:25 5 unreasonable concern for us to have, Your Honor.

09:24:27 6 Unless there are any additional questions or
09:24:32 7 points that I need to address, Your Honor, I think those
09:24:34 8 are the main arguments I wanted to raise.

09:24:38 9 THE COURT: All right. Thank you, counsel.

09:24:40 10 Let me hear a response from the relators.

09:24:43 11 MR. FINDLAY: Thank you, Your Honor.

09:24:57 12 MR. DUCK: Trey Duck on behalf of the relators.

09:24:59 13 Your Honor, I think the first place for us to
09:25:01 14 start is that my legal team has no idea about that
09:25:05 15 Wikipedia page. It seemed like they were pretty strong
09:25:09 16 insinuations that we have some knowledge about it. We do
09:25:11 17 not. No one on my team has any knowledge of how it got up
09:25:16 18 there. I would be happy to answer any questions from the
09:25:19 19 Court about it.

09:25:20 20 I don't think that that is really the issue here.
09:25:22 21 I think it's more of a side show to the -- the -- the
09:25:26 22 actual issues before us. And so, I wanted to get that out
09:25:30 23 of the way before moving forward.

09:25:32 24 THE COURT: Let me -- let me clarify just the
09:25:34 25 timeline in my mind as to how we got to where we are today,

09:25:39 1 Mr. Duck.

09:25:40 2 Relators have not affirmatively moved to
09:25:44 3 de-designate the confidentiality designation attached by
09:25:50 4 Defendants, correct?

09:25:51 5 MR. DUCK: That is correct.

09:25:52 6 THE COURT: Defendants have moved affirmatively
09:25:56 7 for protection regarding the confiden -- confidentiality
09:26:00 8 designations that they've attached to these disputed
09:26:03 9 documents.

09:26:08 10 Did this arise in some meet and confer, or how
09:26:14 11 did -- how did relator and Defendants come to realize we
09:26:16 12 have a different view of the world with regard to these
09:26:19 13 documents and somehow this needs to get before the Court
09:26:21 14 for some guidance?

09:26:22 15 MR. DUCK: Sure. It's a great question. And it
09:26:26 16 ties into my first point, which is that we heard nothing
09:26:29 17 from the Defendants about the procedural mechanism that
09:26:31 18 brought us here, which is the protective order.

09:26:35 19 Under the Court's protective order, the way it
09:26:37 20 works is the party challenges informally by communicating
09:26:42 21 with the other party the documents that they believe have
09:26:52 22 been misdesignated.

09:26:53 23 Following that challenge, the parties meet and
09:26:54 24 confer to determine whether or not there is a dispute over
09:26:56 25 all or some of the documents. And then if the party whose

09:27:00 1 documents have been challenged determine they want to stand
09:27:03 2 on the designations, they have to move for protection.

09:27:06 3 All of those procedures were followed to a T in
09:27:10 4 these two particular cases. We have not blanket challenged
09:27:15 5 the 400,000ish documents produced in this case.

09:27:21 6 We challenged a subset of documents, which I can
09:27:23 7 explain how we selected. And following that, a tiny
09:27:26 8 handful, the Defendants agreed to de-designate, and then
09:27:31 9 they moved for protection on the vast majority.

09:27:33 10 THE COURT: You don't -- you don't differ with
09:27:39 11 perhaps the Court's view here that at its core this is a
09:27:44 12 discovery dispute, do you?

09:27:45 13 MR. DUCK: I believe that it is a discovery
09:27:47 14 dispute that has -- that has implications for the public
09:27:54 15 that are very important.

09:27:54 16 THE COURT: What I'm trying to figure out is why
09:27:57 17 with regard to relators' response to both of these separate
09:28:02 18 motions the Court's page limit on its standing order was
09:28:07 19 ignored, and instead of seven pages, I got 15 pages on each
09:28:11 20 response.

09:28:12 21 Is there a reason why I had to read 15 pages when
09:28:16 22 I have a standing order that limits responses to seven
09:28:19 23 pages in situations like this?

09:28:21 24 MR. DUCK: Well, Your Honor, first let me
09:28:23 25 apologize. I don't believe we viewed these -- these briefs

09:28:26 1 as a discovery brief in the sense that it would be limited
09:28:29 2 by the Court's local rules.

09:28:31 3 And if that was misunderstood by our side, we
09:28:34 4 apologize. And -- and I hate that you had to read more
09:28:38 5 than you believe was necessary.

09:28:40 6 It was not our intention to ignore any of your
09:28:44 7 Court's local rules, and we would never do that.

09:28:46 8 I -- I do believe there is a discovery aspect to
09:28:48 9 this. It is a protective order issue. I think that the
09:28:51 10 public's right to see these documents is the issue to us.
09:28:56 11 We've already got these documents. They've been discovered
09:28:58 12 by the parties in the case.

09:28:59 13 So I hope that I'm not in total disagreement with
09:29:03 14 the Court, but we did not believe that it was a pure
09:29:06 15 discovery dispute in that sense.

09:29:07 16 So --

09:29:11 17 THE COURT: Well, let me suggest to you a better
09:29:15 18 practice might be if there's any doubt, to get some
09:29:18 19 guidance before you just file a motion -- a response that's
09:29:21 20 twice as long as the page limit if you're wrong on how it's
09:29:24 21 going to be characterized.

09:29:26 22 MR. DUCK: Understood. Thank you, Your Honor.

09:29:27 23 The next point I wanted to make was about the
09:29:31 24 limited challenge here. There was argument that this was
09:29:35 25 some broad challenge to all of these documents.

09:29:39 1 I think that we heard thousands of documents.

09:29:42 2 It's not -- it's not thousands of documents. Maybe
09:29:45 3 thousands of pages, but what we did was we identified the
09:29:49 4 very most relevant documents that have already been made
09:29:52 5 part of the Court record.

09:29:53 6 I believe that Mr. Findlay may have misunderstood
09:29:56 7 our argument. We mean they have been filed with the Court
09:29:59 8 under seal, not that they have just been used in
09:30:05 9 deposition -- in depositions, not that the parties have
09:30:07 10 discussed them. We mean they are a part of the ECF court
09:30:12 11 record.

09:30:13 12 We also challenged those documents that are on the
09:30:15 13 parties' exhibit list. There is no document to my
09:30:20 14 knowledge that we challenged that doesn't meet one of those
09:30:24 15 two criteria. They are the documents at issue in the case.
09:30:27 16 There are thousands and thousands and thousands of
09:30:29 17 additional documents we have not challenged and don't
09:30:33 18 intend to challenge.

09:30:34 19 And the reason that --

09:30:36 20 THE COURT: Are -- are you telling me that
09:30:38 21 Defendants or either parties' use of these documents in
09:30:43 22 development of the case such that that use is placed under
09:30:50 23 seal somehow waives the confidentiality designation that
09:30:53 24 Defendants have asserted?

09:30:55 25 MR. DUCK: No, Your Honor, not at all.

09:30:57 1 THE COURT: Okay.

09:30:57 2 MR. DUCK: And we have never made an argument that
09:30:59 3 by using a document in a deposition or by having them filed
09:31:02 4 under seal with the Court waived the confidentiality.

09:31:05 5 We have always abided by the -- the sealing
09:31:07 6 requirements of the protective order, whether we liked it
09:31:10 7 or not, be -- because that's what the Court ordered. We've
09:31:13 8 always agreed to allow the Defendants to file things under
09:31:16 9 seal because that's what the protective order requires.

09:31:18 10 However, now that we are approaching trial very
09:31:21 11 quickly, this case has progressed to where it has, and
09:31:26 12 because we believe we have confirmed exactly what we
09:31:28 13 thought we would confirm, this case is so uniquely of
09:31:33 14 public interest that we believe that this information
09:31:37 15 should be made available, including on the Court's docket,
09:31:40 16 for the public to see.

09:31:41 17 One reason for that is, Your Honor, this is --
09:31:48 18 this is a Medicare case. This is not some private dispute
09:31:50 19 between private citizens about something that no one else
09:31:54 20 cares about. This is something that implicates all of us.

09:31:56 21 We believe that the Defendants' actions have
09:31:58 22 caused every tax paying American to fund fraudulent dollars
09:32:03 23 into their pockets.

09:32:04 24 We know that Team Health has been under
09:32:06 25 investigation by the U.S. Senate for fraudulent billing

09:32:10 1 practices.

09:32:10 2 This is something that people are looking at.

09:32:13 3 This case is something that people are looking at because

09:32:17 4 of the behavior at issue. I have no idea about that

09:32:21 5 Wikipedia page, but my suspicion is that that's the reason

09:32:27 6 it's on there.

09:32:28 7 THE COURT: You're not suggesting we try the

09:32:30 8 merits of this case in the media, are you?

09:32:33 9 MR. DUCK: Not at all. I'm not --

09:32:34 10 THE COURT: You're not suggesting that we

09:32:36 11 facilitate third parties trying the merits of this case in

09:32:39 12 the media by making otherwise confidential documents open

09:32:42 13 and available to the public, are you?

09:32:44 14 MR. DUCK: Not at all. And if they were otherwise

09:32:46 15 confidential, we wouldn't be here. But we don't believe

09:32:50 16 that they are confidential.

09:32:50 17 THE COURT: Is it your argument at its core,

09:32:55 18 Mr. Duck, that there's just not a nucleus of

09:32:58 19 confidentiality here, or is it that there is a nucleus of

09:33:02 20 confidentiality, but the public's right to know exceeds and

09:33:06 21 overcomes that level of confidentiality? I'm trying to

09:33:11 22 determine which of these approaches is your real argument.

09:33:14 23 MR. DUCK: Our view is that there is no nucleus of

09:33:17 24 confidentiality, that these documents aren't actually

09:33:20 25 confidential.

09:33:20 1 And I think one of the most telling things we've
09:33:23 2 seen today is when Your Honor first asked do we need to
09:33:26 3 seal the courtroom in order for us to have this hearing,
09:33:29 4 and the Defendant's response was no, well, that means they
09:33:32 5 have no intention of showing you any of these documents,
09:33:34 6 they have no intention of actually talking about the
09:33:36 7 substance -- the real substance of any of these documents,
09:33:40 8 and they are perfectly fine with the public, to the extent
09:33:44 9 anyone was here, listening to the argument.

09:33:46 10 Now, they haven't even attached any documents to
09:33:49 11 their papers to show the Court what exactly we're talking
09:33:53 12 about, so we did. We filed them under seal, of course,
09:33:56 13 because they're still technically confidentially
09:33:57 14 designated.

09:33:58 15 We invite Your Honor to look at those documents.
09:34:00 16 The only thing that the Defendants have provided, Your
09:34:02 17 Honor, is what essentially amounts to a privilege log that
09:34:05 18 was submitted with the first motion and just generally
09:34:08 19 describes their view of these documents.

09:34:10 20 We don't believe that they've met their burden
09:34:14 21 under the protective order to demonstrate to this Court
09:34:17 22 that these documents should be treated confidentially.

09:34:20 23 And it is their burden under the protective order
09:34:23 24 to file the motion for protection and to prove that these
09:34:28 25 documents are confidential, but no evidence was submitted.

09:34:31 1 They didn't even submit an affidavit. It may have
09:34:34 2 been helpful for -- for them to have done that. They
09:34:37 3 didn't do that. And I believe it's because they know these
09:34:40 4 documents aren't confidential. They demonstrate that the
09:34:43 5 Defendants were engaged in conduct which the relators
09:34:48 6 allege was fraud.

09:34:49 7 The Defendants don't believe it was fraud, but the
09:34:52 8 conduct is there in black and white, nonetheless.

09:34:56 9 So at -- at bottom, Your Honor, we just believe
09:34:59 10 that they haven't carried their burden.

09:35:01 11 My last point is -- is about PHI. We have said
09:35:05 12 from day one that to the extent there is any PHI, that it
09:35:10 13 needs to be redacted. And I mean protected health
09:35:14 14 information under HIPAA.

09:35:15 15 We have been working with the Defendants over the
09:35:17 16 past few weeks together to redact the exhibits on our
09:35:22 17 joint -- on our exhibit list that contain PHI. We've
09:35:25 18 agreed to share costs on doing that.

09:35:28 19 And so, when I hear that there's some challenge by
09:35:32 20 us to open up the world to see protected health
09:35:36 21 information, I've got to address it because we, as much as
09:35:40 22 anyone, want to make sure that people's private health
09:35:44 23 information is not made public.

09:35:46 24 And we will -- we will take whatever steps are
09:35:50 25 necessary and help bear the burden and the resource burden,

09:35:53 1 to make sure that is -- is done.

09:35:55 2 So, Your Honor, with that, I'm finished. I'd be
09:35:57 3 happy to answer any questions if you've got them.

09:35:59 4 THE COURT: Thank you, counsel.

09:36:01 5 MR. DUCK: Thank you.

09:36:01 6 THE COURT: Let me ask for a brief response from
09:36:03 7 the Defendants.

09:36:03 8 MR. FINDLAY: Thank you, Your Honor.

09:36:09 9 THE COURT: Mr. Findlay, Mr. Duck just got through
09:36:11 10 telling me that there's no real underlying confidentiality
09:36:14 11 here. Why don't you tell me your view on that.

09:36:16 12 MR. FINDLAY: That's just not -- that's not true,
09:36:18 13 Your Honor.

09:36:18 14 THE COURT: Why don't -- why don't you give me
09:36:20 15 something specific rather than just a global he's wrong.

09:36:23 16 MR. FINDLAY: These documents are all internal
09:36:26 17 Team Health documents. They deal with issues such as how
09:36:29 18 to bill Medicare for split share services, which is at the
09:36:33 19 heart of this case, for critical care services.

09:36:36 20 They deal with what sort of attestations should be
09:36:40 21 used or should not be used to support those billings to the
09:36:43 22 government. They involve internal Team Health
09:36:46 23 communications on various committees which are designed to
09:36:51 24 determine that.

09:36:51 25 They are by any stretch -- if you look at the

09:36:55 1 definition I've put back up on the screen of the Court's
09:36:59 2 protective order, they are proprietary business information
09:37:01 3 documents.

09:37:01 4 If you go to the definition that is highly
09:37:06 5 confidential, they are commercially sensitive, they are
09:37:08 6 analysis, they're business plans, agreements. They are at
09:37:13 7 the heart of what Team Health does, and it is very
09:37:17 8 confidential and proprietary.

09:37:19 9 To suggest that they should somehow be opened up
09:37:21 10 to the public in general, to Team Health's competitors, I
09:37:26 11 think is wholly unjustified.

09:37:27 12 And, frankly, with all due respect to Mr. Duck,
09:37:32 13 when he suggested, no, he had no intention to try this case
09:37:34 14 in the Court of public media, I think that's exactly what
09:37:38 15 is happening here, Your Honor.

09:37:38 16 You had asked about how did we get to this point.
09:37:40 17 The relators, I think it was back in the late summer, early
09:37:44 18 fall, just sent an email saying: Here's a slew of
09:37:47 19 documents we think have been properly designated. We want
09:37:53 20 them.

09:37:53 21 And Mr. Duck is correct, there's not thousands of
09:37:56 22 documents, but they're large PDFs. And they do constitute
09:38:00 23 thousands of pages of documents -- over 30,000, if you add
09:38:02 24 in the medical records.

09:38:04 25 Normally in a case like this, someone is reaching

09:38:07 1 out to you to say, hey, I think you've designated something
09:38:11 2 wrong, and here's why because I want to be able to show it
09:38:14 3 to -- to Bob who is in-house counsel, or I want to be able
09:38:17 4 to show it to this particular witness for some reason and
09:38:19 5 they're not under the protective order, can we talk about
09:38:22 6 this? This wasn't that at all.

09:38:23 7 This made us highly suspicious that the total
09:38:26 8 intent -- as you asked Mr. Duck if that's what they were
09:38:29 9 really shooting for -- was to try this case in the Court of
09:38:31 10 public opinion.

09:38:32 11 It begs the question -- the elephant in the room
09:38:35 12 is why else would you want these de-designated? I take
09:38:38 13 Mr. Duck at his word that they had nothing to do with and
09:38:42 14 had no knowledge of the Wikipedia page, but it begs the
09:38:45 15 question, hypothetically, if they were all de-designated
09:38:47 16 and they're out there in the public now, what are you going
09:38:50 17 to do with them? Who are you going to send them to?

09:38:53 18 I don't think there's a line of reporters waiting
09:38:56 19 around the courthouse door scrambling to get these
09:39:00 20 materials.

09:39:00 21 The trial in this case will be public, and there
09:39:04 22 may be some documents which we think rise to the
09:39:07 23 sensitivity level that have to be protected from public
09:39:11 24 view. If so, we'll comply with that standing order.
09:39:15 25 That's why I started this argument. And I really didn't

09:39:20 1 hear a response from Mr. Duck on that, that they are
09:39:20 2 jumping ahead to that burden. It is a much higher burden.

09:39:25 3 We all appropriately think it should be, but
09:39:25 4 that's not the burden that's placed on us when we designate
09:39:29 5 materials pursuant to this Court's protective order, as
09:39:34 6 we've done in this case.

09:39:35 7 Lastly, Mr. Duck in his papers and to Your Honor
09:39:41 8 criticizes us because we didn't file an affidavit. Judge,
09:39:44 9 as I said -- and I feel like I'm repeating myself, so I
09:39:49 10 apologize -- there are hundreds of documents, thousands of
09:39:51 11 pages.

09:39:51 12 I don't know how else we could present an
09:39:55 13 affidavit that would otherwise be attacked as just being
09:39:58 14 conclusory. It's kind of a we're darned if we do, darned
09:40:02 15 if we don't on that one, I think.

09:40:04 16 If there were a discrete number of documents, as I
09:40:05 17 think is usually more appropriate and more typical, that
09:40:07 18 would have been a different scenario. But when they put at
09:40:09 19 issue 10 bankers' boxes full of documents, I think that's
09:40:14 20 a -- a red herring.

09:40:17 21 THE COURT: What else?

09:40:18 22 MR. FINDLAY: Nothing else, unless you have any
09:40:20 23 additional questions, Your Honor.

09:40:21 24 THE COURT: No, I don't think I have additional
09:40:23 25 questions. Thank you.

09:40:23 1 MR. FINDLAY: Thank you, Judge.

09:40:24 2 THE COURT: All right. With regard to the
09:40:34 3 Defendants' motion for protection, Document 263, and with
09:40:37 4 regard to the Defendants' second motion for protection,
09:40:42 5 Document 327, I'm going to grant the Defendants' motions in
09:40:50 6 both instances.

09:40:51 7 I disagree with the relators that there's not an
09:40:54 8 underlying element of confidentiality here. I'm not
09:41:01 9 prejudging whether that confidentiality is such that would
09:41:03 10 prevent it from being used during an open trial during the
09:41:06 11 trial of the merits, but I see no reason to strike the
09:41:10 12 confidential designation that the Defendants have placed on
09:41:13 13 these documents now.

09:41:14 14 The Court will have plenty of time to look at
09:41:20 15 which of these -- and I agree with counsel it will probably
09:41:23 16 be a tiny fraction of the total -- but which of these are
09:41:26 17 actually going to be offered for presentation to the jury
09:41:30 18 during trial, and a decision about how those will or won't
09:41:35 19 be used can certainly be made at that time. But as of now,
09:41:38 20 I see no basis to strike across the board the
09:41:44 21 confidentiality -- the confidential designation made under
09:41:46 22 the protective order by the Defendants with regard to these
09:41:49 23 documents.

09:41:49 24 So to that extent, the motions are both granted.

09:41:54 25 Now, I want to move to next and take up the

09:42:03 1 Defendants' motion for leave to file supplemental
09:42:06 2 memorandum in further support of their motion to exclude
09:42:09 3 the testimony of Kristen Folding. That's Document 295.

09:42:14 4 I understand there's a companion Motion 337 that I
09:42:20 5 think was only fully briefed last night or yesterday. It's
09:42:23 6 not set for today.

09:42:26 7 I'm not saying both sides might not get some
09:42:28 8 guidance out of this motion as to that motion, and perhaps
09:42:33 9 it will not have to come back for a subsequent hearing, but
09:42:36 10 I don't intend to get into that -- the merits of that
09:42:39 11 motion today. I want to hear about the motion regarding
09:42:42 12 Ms. Folding.

09:42:43 13 All right. With that, let me hear from the moving
09:42:45 14 Defendants.

09:42:46 15 MR. FINDLAY: And may I approach with some slides,
09:42:48 16 Your Honor?

09:42:48 17 THE COURT: You may.

09:43:07 18 MS. GRANT: Good morning, Your Honor. Robine
09:43:12 19 Grant on behalf of Team Health Defendants. May it please
09:43:14 20 the Court.

09:43:14 21 THE COURT: Please proceed, Ms. Grant.

09:43:16 22 MS. GRANT: Your Honor, before you is Defendants'
09:43:18 23 motion for leave to file supplemental memorandum in further
09:43:21 24 support of Defendants' motion to exclude the opinion
09:43:24 25 testimony of relators' designated expert, Kristen Folding.

09:43:29 1 The depositions of all the experts in this matter
09:43:32 2 took place after the Defendants and relators were required
09:43:35 3 to file their initial Daubert briefs on December 17th,
09:43:42 4 2020. Ms. Folding also served her supplemental report
09:43:47 5 after that date on October 1 of 2020.

09:43:49 6 During Ms. Folding's deposition and in her
09:43:52 7 supplemental report, she disclosed information that both
09:43:55 8 crystallized and expanded a live issue before the Court
09:43:58 9 relating to what the parties have been calling the missing
09:44:01 10 records or the unavailable record, as well as new facts
09:44:05 11 that Defendants weren't able to figure out previously from
09:44:09 12 reading relators' reports and the backup material relating
09:44:13 13 to an assistant that Ms. Folding relied upon to conduct her
09:44:18 14 analyses and render her opinions in these matters.

09:44:21 15 Given that this is a live issue before the Court,
09:44:25 16 we wanted to update the briefing and provide Your Honor
09:44:28 17 with all the information that you will need to fully
09:44:31 18 analyze and assess the motion to exclude Ms. Folding when
09:44:35 19 it's set for the pre-trial hearing in January 2021.

09:44:40 20 THE COURT: Let me ask you this, Ms. Grant,
09:44:42 21 didn't -- didn't you have the benefit of this supplemental
09:44:44 22 report, and hadn't it been served on you before you filed
09:44:46 23 your reply brief in this situation?

09:44:48 24 MS. GRANT: Your Honor, the reply brief was filed
09:44:54 25 after the supplemental report. The only thing that was

09:44:58 1 updated in the supplemental report that was not included in
09:45:02 2 the original brief that we're using as a basis for our
09:45:05 3 current motion for leave to supplement is the disclosure
09:45:09 4 of -- or rather, sorry, her expansion of this spoliation
09:45:14 5 argument to make it clear that what she was doing was
09:45:17 6 including an adverse inference based on the unavailable
09:45:22 7 missing records.

09:45:22 8 We did not have any information relating to
09:45:25 9 Mr. Folding [sic] until her deposition, and that was after
09:45:28 10 the reply was filed.

09:45:29 11 THE COURT: You mean Mr. Forrester?

09:45:32 12 MS. GRANT: Sorry. Well, Ms. -- Ms. -- Mr.
09:45:34 13 Forrest -- Ms. Folding's reliance on Mr. Forrester during
09:45:36 14 her deposition after the reply was filed.

09:45:40 15 THE COURT: Too many Fs in here.

09:45:41 16 MS. GRANT: Yes, there are. Thank you, Your
09:45:43 17 Honor.

09:45:43 18 THE COURT: All right.

09:45:43 19 MS. GRANT: May I proceed?

09:45:45 20 THE COURT: Yes, please.

09:45:47 21 MS. GRANT: I'll start with the argument relating
09:45:49 22 to the unavailable missing records.

09:45:50 23 As you know, this was briefed in the original
09:45:53 24 Daubert briefing relating to Ms. Folding. This is an
09:45:57 25 important issue, and I have this slide on the screen to --

09:46:00 1 to demonstrate why that is.

09:46:01 2 Ms. Folding was responsible for deriving the
09:46:03 3 universe from which relators are establishing their entire
09:46:08 4 damages theory.

09:46:08 5 The unavailable records, the -- the 20 and 54, the
09:46:13 6 74 unavailable records which account for 15 percent of
09:46:17 7 the -- the sample size account for approximately 76 percent
09:46:21 8 of relators' total damages. And you'll see that -- well,
09:46:26 9 this is how she gets there.

09:46:28 10 So she pulls out the 20 records from the split
09:46:33 11 share claim of 97 claims, and she assigns a zero dollar
09:46:37 12 value for every single one of those claims, assuming that
09:46:40 13 it's false, assuming that full damages are owed on those
09:46:44 14 records because they don't exist today or didn't exist when
09:46:48 15 they were requested in 2020, at least in Defendants'
09:46:53 16 possession.

09:46:53 17 Defendants -- she then -- you know, for the claims
09:46:55 18 that she denied, because she found that they were
09:46:59 19 insufficient documentation -- for example, she saw the
09:47:01 20 records, she decided that it didn't meet the standards that
09:47:03 21 she applied in her review -- she did not apply a zero
09:47:07 22 damages value. She, instead, applied a differential.

09:47:12 23 So for the split share claims that would be 85
09:47:14 24 cents on the dollar she would have said Team Health was
09:47:17 25 appropriately paid, which is how the damages are so heavily

09:47:21 1 weighted in favor of these missing records.

09:47:24 2 The same is true for the critical care claim. The
09:47:27 3 differential is different, but the analysis is essentially
09:47:29 4 the same.

09:47:30 5 She uses 54 records and applies a zero dollar
09:47:35 6 value and says that every single dollar that Team Health
09:47:38 7 Defendants received on those claims should be returned as a
09:47:44 8 false payment to them, whereas for all of the other claims
09:47:47 9 that she denies for lack of documentation, when she
09:47:50 10 actually receives a document and reviews it, there is a
09:47:52 11 differential value associated with that based on what she
09:47:55 12 believes the documentation supports.

09:47:56 13 This is extremely important. There's been no
09:48:03 14 motion for spoliation. There's no evidence that there's
09:48:06 15 been any bad faith or bad conduct on the part of Defendants
09:48:10 16 in not producing these documents.

09:48:12 17 As you can see from this chart, these documents
09:48:15 18 are heavily weighted before 2013. In fact, most of the
09:48:20 19 documents from 2006, 2007, and 2008 -- in fact, all,
09:48:25 20 rather, of the documents in the claim sample for those
09:48:28 21 three years were not provided because Defendants did not
09:48:32 22 have them in their possession.

09:48:34 23 And she included every single one of those as a
09:48:36 24 zero dollar value in what was then plugged into the damages
09:48:40 25 model.

09:48:40 1 There are no missing records from 2013 -- or,
09:48:45 2 sorry, from 2014 forward, and only one from 2013. I
09:48:48 3 understand that Team Health Defendants moved to an
09:48:52 4 electronic medical record system around 2012.

09:48:55 5 And before then, there were paper records that
09:48:58 6 were either maintained in offsite storage or Team Health
09:49:02 7 Defendants never even took control and possession of these
09:49:05 8 records. Rather, they had agreements -- right of access
09:49:09 9 agreements with the hospitals whereby the hospitals would
09:49:12 10 grant them access to retrieve and look at those records on
09:49:15 11 the hospital system, never take possession of them, use
09:49:18 12 them for coding, and that access was limited. It lasts for
09:49:23 13 a limited period of time, and it's the -- Team Health's use
09:49:26 14 of those records was also limited.

09:49:28 15 The -- the -- those agreements, I understand, also
09:49:31 16 say that they are -- the document -- very clearly say that
09:49:37 17 the documents are documents of the hospitals.

09:49:39 18 Relators have admitted in -- in the briefing and
09:49:40 19 in discovery communications that they knew that they might
09:49:43 20 need to go and seek documentation from hospitals related to
09:49:47 21 these medical records, but they never did so.

09:49:49 22 And in failing to do so and in failing to bring a
09:49:54 23 motion for spoliation, they're circumventing the
09:49:57 24 required -- the Court's -- the Court's duty to make an
09:50:00 25 order and decide whether these documents are -- are missing

09:50:03 1 improperly or not, as well as the required finding that
09:50:06 2 there was some bad conduct or bad action by relator -- or,
09:50:10 3 by, sorry, Team Health Defendants in those documents not
09:50:14 4 being available.

09:50:15 5 Team Health Defendants are absolutely ready to
09:50:17 6 defend their ability and their actions in discovery, and --
09:50:21 7 and certainly would do that if that motion had been teed
09:50:24 8 up.

09:50:24 9 The key word is the word "missing" here suggests
09:50:34 10 that these records were destroyed. And, in fact, that's
09:50:34 11 how they're being used by Ms. Folding. She's assuming that
09:50:37 12 they're false, and she's assuming that full damages are
09:50:40 13 owed on these records.

09:50:41 14 Those are burdens of proof that belong to relators
09:50:44 15 that they're inappropriately now shifting to Team Health
09:50:48 16 Defendants based on their damages model.

09:50:51 17 THE COURT: Aren't -- aren't we getting into the
09:50:52 18 merits of the Daubert here more than we are talking about
09:50:55 19 why you should have leave to supplement your response --

09:50:58 20 MS. GRANT: Your Honor --

09:51:00 21 THE COURT: -- or your motion, rather?

09:51:02 22 MS. GRANT: -- respectfully, I am getting into the
09:51:07 23 merits to demonstrate why this is such an important issue
09:51:10 24 and why it's important for all of this briefing and
09:51:11 25 testimony to be before Your Honor.

09:51:13 1 But it's true and certainly would argue the merits
09:51:16 2 and -- and don't anticipate a -- a -- a ruling on the
09:51:18 3 merits today. I just wanted to emphasize its importance,
09:51:22 4 and I will move on.

09:51:22 5 THE COURT: Well, Daubert motions are so much fun,
09:51:27 6 you know. We ought to argue them three or four times.

09:51:29 7 Go ahead.

09:51:30 8 MS. GRANT: Thank you, Your Honor.

09:51:30 9 Well, I will turn to the next issue that we raised
09:51:34 10 in -- in the motion for leave to supplement and the
09:51:37 11 supplemental brief that we attached.

09:51:39 12 Now, this is one that is a completely new issue.
09:51:41 13 We had no idea about it when we reviewed Ms. Folding's
09:51:46 14 report, when we reviewed her supplemental report.

09:51:49 15 It was only in her deposition after all of the
09:51:51 16 briefing was done on the original Daubert motion that we
09:51:55 17 learned and knew how much Ms. Forrester -- or Ms. Folding,
09:52:00 18 I apologize, relied on Mr. Forrester.

09:52:03 19 Relators in their response brief argue that this
09:52:08 20 is just a weight of evidence issue that can be examined on
09:52:12 21 cross-examination. And, respectfully, I disagree. You
09:52:16 22 know, they are using -- Ms. Folding is using
09:52:20 23 Mr. Forrester's hearsay testimony and opinions to render
09:52:24 24 her own opinions.

09:52:25 25 And while Rule 703 allows that to -- the hearsay

09:52:30 1 opinions to be used, it's not appropriate in instances as
09:52:35 2 these, and we've cited a number of cases in our underlying
09:52:39 3 supplemental motion demonstrating why it's not appropriate
09:52:43 4 here.

09:52:43 5 Mainly, if an expert does not apply her own
09:52:46 6 expertise, if she does not say that she has the expertise
09:52:49 7 to scrutinize, review, evaluate what the underlying
09:52:55 8 assistant has done, if she has not designed the study, if
09:52:59 9 she has not directed how it is to be done, then that is an
09:53:03 10 admissibility issue, and caselaw indicates that it is not
09:53:06 11 appropriate to allow an expert to testify if they
09:53:12 12 ordinarily are a mouthpiece for an undisclosed expert.
09:53:17 13 And, respectfully, we -- we posit that as what is -- is
09:53:21 14 taking place here.

09:53:21 15 In your slide deck which you provided, I provided
09:53:22 16 some language that I just spoke to. The only case that we
09:53:25 17 cited in our supplemental brief that relators included in
09:53:28 18 their response opposing our motion for leave is the case
09:53:33 19 Dura Automotive Systems of Indiana. It's a Seventh Circuit
09:53:40 20 case from 2002. Relators agreed with the first proposition
09:53:43 21 on this slide. An expert witness is permitted to use
09:53:46 22 assistants in formulating his expert opinion.

09:53:47 23 We completely agree, Your Honor. That is
09:53:49 24 appropriate.

09:53:49 25 What isn't appropriate is what the -- the case

09:53:52 1 goes on to say: When analysis becomes more complicated and
09:53:56 2 the assistants move from assisting with experts' work to
09:54:01 3 being -- exercising their own professional judgment -- and
09:54:04 4 this is what's key -- that is outside the expert's ken.

09:54:12 5 And that's exactly the situation here. And we had
09:54:14 6 no way to know that until Ms. Folding indicated so on --
09:54:15 7 during her deposition.

09:54:20 8 Here's some examples of what she said about her
09:54:23 9 expertise. One of the -- the things that Mr. Forrester, we
09:54:25 10 found out, had done was he was responsible for selecting
09:54:28 11 the critical care diagnostic codes in that universe that
09:54:32 12 derived that sample of 384 claims that I showed you earlier
09:54:37 13 in the damages model.

09:54:38 14 Interestingly, we -- our experts discovered that
09:54:41 15 10 of the top 15 diagnostic codes for critical care had
09:54:47 16 been removed. They're nowhere in that universe in the
09:54:50 17 samples that they saw.

09:54:51 18 Ms. Folding was questioned about how this was
09:54:55 19 derived at her deposition. Each time she asked, she said:
09:55:01 20 I'm not a clinician, and I'm reticent to represent whose
09:55:03 21 activities that were clinical in nature, describing
09:55:05 22 Mr. Forrester's. She continued that Mr. Forrester is the
09:55:06 23 subject matter expert in the area, and she's not. So she's
09:55:09 24 --

09:55:09 25 THE COURT: Let me stop you, Ms. Grant.

09:55:11 1 MS. GRANT: Thank you, Your Honor.

09:55:12 2 THE COURT: We're back into the merits again.

09:55:13 3 I really want to focus on why you need these
09:55:19 4 supplemental pages that you're asking for and not what the
09:55:24 5 underlying merits of the, as I say Daubert, as you say
09:55:29 6 Daubert motion really is.

09:55:31 7 MS. GRANT: Thank you, Your Honor.

09:55:31 8 With respect to the Forrester issue, which is the
09:55:36 9 one that I'm discussing now, we need the pages because the
09:55:39 10 argument was not known. We could not have known it at the
09:55:42 11 time that we filed our initial Daubert and -- and briefed
09:55:47 12 the -- the motion in full.

09:55:48 13 And we did not know that because all of that
09:55:51 14 happened before we took Ms. Folding's deposition.

09:55:54 15 I'll move forward and show you how he was
09:55:57 16 disclosed in her report. All she says is: David
09:56:03 17 Forrester, RN, supported the data analysis and review
09:56:06 18 process for this engagement support.

09:56:09 19 We agree assistants are appropriate if the expert
09:56:12 20 has the expertise, reviews the process, scrutinizes.
09:56:16 21 That's all they said about him here.

09:56:19 22 Then they describe his qualifications. They don't
09:56:21 23 say he used them here, he used them at the exclusion of
09:56:26 24 Ms. Folding's qualifications.

09:56:28 25 He also attached a CV. Again, there was no way

09:56:31 1 for us to know that Ms. Folding herself felt that she did
09:56:33 2 not have the expertise to guide his review and his work.

09:56:33 3 Relators in their response indicate that they
09:56:40 4 disclosed the use of Mr. Forrester with the language that
09:56:43 5 I've highlighted here from Pages 13 and 17 of Ms. Folding's
09:56:50 6 report.

09:56:50 7 THE COURT: Let me ask another question. Clearly,
09:56:52 8 the original report mentions Mr. Forrester. Clearly, the
09:56:55 9 original report mentions that he assisted Ms. Folding.

09:57:02 10 I mean, I don't see any problem that that doesn't
09:57:05 11 open the door to on the merits you making the kind of
09:57:08 12 argument that you're making. I just don't know why I need
09:57:11 13 to read more pages of briefing on it.

09:57:14 14 I'm going to hear the argument and consider it
09:57:16 15 fully when we get to the motion itself at pre-trial.

09:57:22 16 Again, all the things that in your briefing you've
09:57:25 17 said support your motion for leave to supplement in written
09:57:31 18 form, yes, they're not as developed in the original report
09:57:34 19 as perhaps subsequently information has -- has come to your
09:57:40 20 hands, but I don't know that any of the issues you're
09:57:43 21 talking about having to raise in this supplemental briefing
09:57:47 22 are absolutely absent and have not been mentioned at all
09:57:53 23 either in the original report or the supplemental report
09:57:57 24 that you had before you filed your reply.

09:57:59 25 So if there's something that you feel you're going

09:58:02 1 to be prohibited from raising at the Daubert motion when
09:58:06 2 it's taken up on the merits because you didn't get a chance
09:58:09 3 to write about it and you need these pages so that you're
09:58:12 4 not prejudiced, tell me.

09:58:15 5 Otherwise, it looks like the topics that you want
09:58:18 6 to talk about in these additional pages are not new, and
09:58:22 7 you're not going to be barred from discussing them more
09:58:27 8 fulsomely at the hearing on the merits than you would in
09:58:30 9 your previous written replies.

09:58:33 10 So, again, if you're not going to be cut off from
09:58:38 11 arguing the merits as you fully understand them at the time
09:58:41 12 the motion is taken up, I don't see how you're prejudiced
09:58:46 13 if you don't get these additional pages you're asking for.
09:58:49 14 Does that make sense?

09:58:50 15 MS. GRANT: It does make sense. Thank you, Your
09:58:52 16 Honor.

09:58:52 17 In response, I'd say, I -- I understand, and I
09:58:56 18 certainly don't want to burden the Court with more briefing
09:58:59 19 on issues that you've already seen.

09:59:01 20 I agree with you in particular with respect to the
09:59:08 21 briefing that we have proposed relating to the spoliation
09:59:14 22 inference. That one is such a key argument, and we didn't
09:59:16 23 know until after the original Daubert that that's how they
09:59:19 24 were justifying Ms. Folding's use of it.

09:59:22 25 In her original report, it was justified by saying

09:59:25 1 that, you know, if documentation doesn't exist, it never
09:59:29 2 existed. And said that she was making an inference on that
09:59:32 3 basis, not that she as an expert witness was making a
09:59:35 4 spoliation inference.

09:59:38 5 As to the issue relating --

09:59:40 6 THE COURT: Let me stop you -- let me stop you for
09:59:42 7 a second and just ask it this way, and I'll try to make
09:59:45 8 this as clear as I can.

09:59:47 9 Is there some substitute argument that you are
09:59:51 10 concerned you will be prohibited from making at the Daubert
09:59:54 11 motion when it's taken up on the merits if you don't get
09:59:56 12 this additional briefing?

09:59:58 13 MS. GRANT: Yes, Your Honor.

09:59:58 14 THE COURT: If so, tell me what that is and why
10:00:01 15 you believe you'd be barred from presenting.

10:00:05 16 MS. GRANT: Yes, Your Honor. And I apologize, I
10:00:06 17 didn't mean to jump in too soon.

10:00:09 18 I believe we would be barred potentially from
10:00:12 19 arguing the issue relating to -- to Mr. Forrester and her
10:00:16 20 reliance on his -- his basically undisclosed expert
10:00:22 21 opinions and expert work in the case. That was not raised
10:00:25 22 at all in the initial briefing, and I have looked --

10:00:28 23 THE COURT: Has there been something from the
10:00:30 24 relators that makes you believe they would try to prevent
10:00:32 25 you from arguing that? Or is it just a self-generated

10:00:38 1 concern on your part that we need to have not only a belt
10:00:42 2 but suspenders and every other kind of backup we can
10:00:46 3 possibly have so that we can't be prohibited from arguing
10:00:49 4 it?

10:00:50 5 Did they say something or indicate in some way
10:00:52 6 they were going to oppose that, and that's why you felt you
10:00:54 7 needed to come forward and affirmatively ask for the leave
10:00:57 8 you have, or did you just decide we better ask because we
10:01:00 9 don't want to -- we don't want to be caught unawares?

10:01:05 10 MS. GRANT: Your Honor, they opposed us asking to
10:01:08 11 supplement our Daubert. They've opposed this brief. They
10:01:12 12 also argue that this is a weight, not an admissibility
10:01:16 13 issue, which I believe indicates that they would oppose us
10:01:19 14 from arguing it, meaning that it's not a Daubert issue at
10:01:22 15 all. It's for cross-examination.

10:01:23 16 We disagree. And we had no way to raise this in
10:01:28 17 our original Daubert briefing, and so, did not specifically
10:01:31 18 move on this point because we thought that Mr. Forrester
10:01:33 19 was being used as an assistant, appropriately according to
10:01:38 20 the caselaw, and we did not know that we needed to move on
10:01:40 21 that issue in the original Daubert.

10:01:43 22 So, respectfully, yes, I -- I -- I believe based
10:01:45 23 on our discussions and what I have seen today that they
10:01:47 24 would oppose us arguing this specific issue and that we
10:01:52 25 would be significantly prejudiced based on our inability to

10:01:56 1 learn that until after the briefing had been completed on
10:01:58 2 the original Daubert motion.

10:02:00 3 THE COURT: See, in my mind, if the relators say
10:02:02 4 it goes to the weight of the issue, then, to me, that means
10:02:05 5 the issue is appropriate to be fully argued, and the Court
10:02:10 6 has to decide whether it should be handled by
10:02:13 7 cross-examination or should it be handled by striking a
10:02:15 8 part of the report so it's not heard at all. It's not a
10:02:19 9 matter of if it comes in in the argument. It's a matter of
10:02:25 10 how the Court most appropriately deals with.

10:02:28 11 So when you say that we were concerned because
10:02:30 12 they said it goes to weight, that makes me feel like
10:02:32 13 they're admitting that it's an appropriate argument to be
10:02:35 14 presented to the Court, then putting the Court in the
10:02:38 15 position of deciding what's the appropriate remedy, not
10:02:41 16 whether I hear the argument, not whether you're precluded
10:02:44 17 and can't make it because you didn't brief it, but how do I
10:02:47 18 handle it?

10:02:48 19 MS. GRANT: Understood, Your Honor. And -- and,
10:02:50 20 respectfully, if we're able to argue both of these -- these
10:02:54 21 points. I mean, certainly I, you know, respectfully
10:02:58 22 believe that the additional briefing is extremely helpful
10:03:01 23 and -- and highlights the issues in the full record for
10:03:04 24 Your Honor.

10:03:05 25 But if we are entitled to argue both of these

10:03:08 1 points, then I don't think that the prejudice exists in
10:03:11 2 terms --

10:03:12 3 THE COURT: Well, I don't want to speak for
10:03:13 4 relators, and they may get up here and tell me we didn't
10:03:16 5 say it went to -- just to the weight, and we do think it
10:03:19 6 ought to be precluded, but I'm just -- you're indicating to
10:03:22 7 me you believe that's their position.

10:03:23 8 And I'm just assuming that if that is their
10:03:28 9 position, it wouldn't in my mind preclude the issue from
10:03:31 10 being presented. It would just go to how the Court wants
10:03:34 11 to then deal with that issue.

10:03:35 12 MS. GRANT: Understood, Your Honor. And I
10:03:37 13 certainly don't intend to speak for relators either. And,
10:03:40 14 you know, so long as we have -- these arguments are
10:03:44 15 preserved, we don't, you know, have any preference as to
10:03:47 16 how your court would like us preserve them and make them at
10:03:50 17 the January hearing.

10:03:51 18 THE COURT: Okay.

10:03:51 19 MS. GRANT: Okay.

10:03:52 20 THE COURT: Anything else, Ms. Grant?

10:03:54 21 MS. GRANT: I -- I believe that's all for now.
10:03:57 22 Thank you, Your Honor.

10:03:58 23 THE COURT: Let me -- thank you.

10:03:58 24 Let me hear a response from relators.

10:04:01 25 MR. DUCK: Well, Your Honor, I'm -- I'm kind of in

10:04:13 1 a pickle because I want to respond to so much of the
10:04:16 2 substance, but I know that's not the issue.

10:04:17 3 THE COURT: I don't want you to do that.

10:04:19 4 MR. DUCK: I know you don't. And that really
10:04:21 5 highlights the -- the argument here.

10:04:22 6 THE COURT: And you're a more -- you're a more
10:04:23 7 seasoned lawyer than Ms. Grant is, and I'm not going to be
10:04:27 8 as nice to you as I was to her.

10:04:29 9 MR. DUCK: Yes, sir.

10:04:29 10 Well, Your Honor, it really raises the -- the
10:04:32 11 whole point of why we -- why we oppose the supplement,
10:04:34 12 which is when you attached the brief that you are asking
10:04:38 13 for leave to file substantively, the issues are before the
10:04:41 14 Court. Whether the Court decides to read those issues is,
10:04:46 15 of course, up to Your Honor.

10:04:47 16 However, the issues are now there. They've
10:04:50 17 achieved the goal which is to raise this substance. And
10:04:52 18 so, a ruling denying their motion for leave is in some
10:04:56 19 sense symbolic to -- to make sure that we just don't keep
10:05:01 20 doing this. When is it going to be over? When is the
10:05:04 21 briefing going to be finalized?

10:05:06 22 We are trying to get ready for trial. And I know
10:05:09 23 that we exceeded page limits as we should not have, Your
10:05:12 24 Honor, but we take that seriously.

10:05:13 25 And we feel like the Court has been inundated with

10:05:16 1 papers by these Defendants, and it just hasn't stopped.

10:05:20 2 We've never taken the position that the Defendants
10:05:23 3 cannot raise something that they find out after the fact at
10:05:27 4 the hearing.

10:05:28 5 All the time, depositions occur after Daubert
10:05:33 6 motions happen. And a lot of times, the deposition
10:05:35 7 transcript is read at the Daubert hearing. We're not going
10:05:39 8 to object to that.

10:05:40 9 I do hope that there is -- there are some
10:05:43 10 parameters to the hearings in that if you didn't brief it,
10:05:47 11 you shouldn't be able to raise anything and everything that
10:05:50 12 you want to argue just because now we're dealing with a
10:05:55 13 hearing by surprise.

10:05:56 14 We believe everything was fully disclosed. And
10:05:59 15 one thing that's very important for this particular motion
10:06:01 16 and its -- its companion, which we're not addressing today,
10:06:05 17 is that these Defendants didn't ask for the depositions of
10:06:08 18 our experts until after their Daubert deadline. They could
10:06:12 19 have. They chose not to.

10:06:14 20 We were actually under the assumption that has --
10:06:19 21 has kind of come back in style, these Defendants were just
10:06:22 22 not going to depose our experts.

10:06:24 23 It happens every now and then. And it then after
10:06:27 24 the Daubert motions or very close thereto, we receive a
10:06:31 25 request. We gave them dates. The dates lapsed.

10:06:36 1 So they came back, and we gave them additional
10:06:39 2 dates. By that time, the Daubert -- the Daubert deadline
10:06:42 3 had passed.

10:06:42 4 So, sure, they can argue that they learned
10:06:45 5 something new in the deposition. We disagree.

10:06:46 6 But even if that were true, that they learned
10:06:52 7 something new, the dates of those depositions was the
10:06:55 8 Defendants' own doing, and we shouldn't be penalized by
10:07:00 9 having to brief and brief and brief new issues just because
10:07:03 10 they were not prioritizing these depositions.

10:07:05 11 That is why we're opposing this, to make sure that
10:07:10 12 we don't just keep getting this. Last week, there was
10:07:13 13 another one. We tried to respond early in case Your Honor
10:07:18 14 wanted to take it up. We certainly are not intending to
10:07:21 15 argue that, but who knows what's next.

10:07:23 16 We've got some additional discovery coming up that
10:07:26 17 Your Honor has allowed, and there are several pending
10:07:28 18 motions right now.

10:07:29 19 And we just hope that there's not supplemental
10:07:34 20 briefing after supplemental briefing. And that's why we
10:07:37 21 oppose it.

10:07:37 22 But, Your Honor, we want hearings to be fulsome
10:07:40 23 and both sides be able to argue their points. We want to
10:07:43 24 be able to argue our points without someone objecting that
10:07:45 25 we didn't technically raise some nuance in our briefing.

10:07:49 1 And so, let's go have the Daubert hearings. That's --
10:07:53 2 that's relators' position, and let's quit writing about it.
10:07:58 3 THE COURT: All right.
10:07:59 4 MR. DUCK: Thank you.
10:07:59 5 THE COURT: Thank you.
10:08:00 6 Ms. Grant, do you have anything else?
10:08:02 7 MS. GRANT: Your Honor, just briefly.
10:08:05 8 I want to reiterate that we have no objection to
10:08:12 9 the denial of our motion so long as the understanding is
10:08:16 10 that this will not be an argument at the hearing by
10:08:20 11 surprise, that we have notified relators of what we intend
10:08:23 12 to argue, we've notified the Court, and that we're entitled
10:08:26 13 to argue all of the issues that we've raised in our
10:08:28 14 supplemental briefing is absolutely fine with us.
10:08:31 15 Respect --
10:08:33 16 THE COURT: Well, let me ask you this.
10:08:34 17 MS. GRANT: Yes, Your Honor.
10:08:35 18 THE COURT: Did you pick up the phone and call the
10:08:41 19 relators and say, you know, we think this has been
10:08:45 20 developed further in the discovery after the briefing on
10:08:48 21 the Daubert was concluded? We want to make sure you're not
10:08:52 22 going to try to hold us to an artificially technical
10:09:00 23 standard, and if you're not, no, no big deal. If you are,
10:09:03 24 then we may feel like we have to ask the Court to allow us
10:09:06 25 to file some additional briefing?

10:09:08 1 Did you do that by -- before you filed this
10:09:10 2 motion?

10:09:11 3 MS. GRANT: We did.

10:09:11 4 THE COURT: Because you should have, if you
10:09:12 5 didn't.

10:09:13 6 MS. GRANT: Yes, Your Honor, we did --

10:09:14 7 THE COURT: And did they tell you they were going
10:09:16 8 to hold you to an artificially technical standard, and
10:09:19 9 that's why you felt like you had to go ahead, or did they
10:09:22 10 tell you what I just heard from them now, that we both want
10:09:25 11 a fulsome argument at the time the motion is taken up on
10:09:28 12 the -- on the merits?

10:09:29 13 MS. GRANT: It was articulated that they would
10:09:32 14 oppose the relief that we were requesting. So we
10:09:34 15 anticipated that that meant that they were opposing that.

10:09:38 16 And I certainly did not mean to burden Your Honor
10:09:41 17 with arguments that are unnecessary and we can have
10:09:41 18 discussions -- make sure that's clearly --

10:09:41 19 THE COURT: Well --

10:09:44 20 MS. GRANT: -- developed in the future, but we
10:09:45 21 certainly did call and discuss.

10:09:46 22 THE COURT: -- then that means somebody is not
10:09:48 23 telling me exactly the way it really happened because I'm
10:09:51 24 hearing it in two very diametrically opposed versions.

10:10:00 25 I'm going to deny this motion, and I suggest to

10:10:02 1 you that unless there's something wholly unique about the
10:10:06 2 one that just completed briefing, it's probably going to
10:10:10 3 suffer the same fate.

10:10:12 4 I'm going to tell both sides that I intend to hear
10:10:15 5 fulsome argument on the merits when we get to the Daubert
10:10:20 6 motions at pre-trial.

10:10:21 7 And unless there is a compelling reason why I need
10:10:25 8 to constrain those arguments, I don't -- probably won't do
10:10:29 9 that.

10:10:30 10 And I know that relators' lawyers are experienced
10:10:35 11 enough before this Court to know that is this Court's
10:10:39 12 general approach.

10:10:41 13 And I know counsel -- co-counsel to you on the
10:10:43 14 Defendants' side are experienced enough before this Court
10:10:46 15 to know that is going to be this Court's typical approach.

10:10:49 16 I'm not sure why I need to spend the time this
10:10:52 17 morning hearing about whether I should allow certain number
10:10:56 18 of additional pages to be filed.

10:11:02 19 Again, my questions during the argument were: Is
10:11:04 20 there going to be some prejudice because somebody is going
10:11:08 21 to be precluded because there's going to be a surprise here
10:11:12 22 if these pages don't get filed? And I'll be honest, I
10:11:16 23 really haven't heard that.

10:11:17 24 And in my reading of the briefing, most of what
10:11:20 25 you've raised in your motion, if not all of what you've

10:11:23 1 raised in your motion at least has been touched on in the
10:11:27 2 underlying motion and the briefing related to it which to
10:11:31 3 me would make it clear that it's fair game for argument
10:11:37 4 when we get there.

10:11:38 5 So I'll be honest, I really, in reading the
10:11:41 6 briefing, didn't see a compelling reason why this motion
10:11:46 7 needed to be presented.

10:11:46 8 I've got enough to do without having unnecessary
10:11:53 9 motions to allow additional pages of briefing when a lot of
10:12:00 10 what's mentioned is in the original report, and then you
10:12:04 11 have the benefit of the supplemental report before you file
10:12:06 12 your reply.

10:12:10 13 I don't -- I don't feel compelled to give either
10:12:13 14 side three bites at the apple. We will tee this up when we
10:12:21 15 get to pre-trial on the merits when the motion is taken up,
10:12:21 16 and I'll hear everybody's arguments.

10:12:21 17 And somebody's going to have to show me a very
10:12:23 18 compelling reason why I should keep an opposing counsel
10:12:27 19 from making an argument on the merits of the motion at that
10:12:30 20 time.

10:12:31 21 But both sides knowing that's the Court's general
10:12:34 22 approach, I can't really view what's before me now as much
10:12:43 23 more than a waste of my time.

10:12:44 24 I'm not imputing any bad motive, but by the same
10:12:50 25 token, I've been on this bench nine years this month, and I

10:12:58 1 think pretty much everybody in this courtroom knows how I'm
10:13:01 2 going to handle this Daubert motion when we get there.

10:13:03 3 So, again, all things considered, the motion to
10:13:09 4 allow leave to file the additional briefing as sought by
10:13:13 5 the Defendants in regard to the Daubert motion pending
10:13:16 6 regarding Kristen Folding is denied.

10:13:19 7 All right. Thank you, Ms. Grant.

10:13:21 8 MS. GRANT: Thank you, Your Honor.

10:13:21 9 THE COURT: Are there additional matters that are
10:13:23 10 set for argument this morning that the Court somehow has
10:13:26 11 overlooked or not taken up that either side is aware of?

10:13:29 12 MR. DUCK: Not to my knowledge, Your Honor.

10:13:31 13 MR. FINDLAY: No, Your Honor.

10:13:32 14 THE COURT: All right. I will say this before I
10:13:45 15 step down off the bench today. I think Defendants should
10:13:49 16 be acknowledged by the Court as having allowed Ms. Grant to
10:13:54 17 argue this motion.

10:13:55 18 I see too many cases where lawyers of considerable
10:14:02 19 age and experience feel compelled to take everything on
10:14:05 20 their own shoulders, and the young lawyers don't get a
10:14:09 21 chance. And it's an important part of preparing our
10:14:13 22 profession for the future that young lawyers get a chance.

10:14:16 23 And, Ms. Grant, you did a good job this -- this
10:14:18 24 morning, even though I denied your motion. And I commend
10:14:23 25 Mr. Melsheimer and the defense team as a whole for allowing

10:14:25 1 you to do that.

10:14:26 2 That said, don't file some motions just so the
10:14:31 3 young lawyers get a chance to argue them.

10:14:34 4 MR. MELSHEIMER: Your Honor, we'll pick a better
10:14:36 5 motion.

10:14:37 6 THE COURT: I did want to acknowledge that in the
10:14:39 7 record.

10:14:39 8 MR. MELSHEIMER: Thank you, Your Honor. And Merry
10:14:43 9 Christmas and happy holidays to the Court and its staff.

10:14:47 10 THE COURT: All right. Same to everyone else.
10:14:47 11 That competes this morning's hearing.

10:14:51 12 Court is adjourned.

10:14:52 13 COURT SECURITY OFFICER: All rise.

10:14:53 14 (Hearing concluded.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/s/ Shelly Holmes
SHELLY HOLMES, CSR, TCRR
OFFICIAL REPORTER
State of Texas No.: 7804
Expiration Date: 12/31/2020

12/15/2020
Date